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Nos. 81-2147 and 81-2188

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA, ET AL.

STATE OF MONTANA, ET AL., PETITIONERS

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the disclaimers of State jurisdiction over Indian lands contained in the Enabling Acts for Arizona and Montana and in their Constitutions disable the courts of those States from adjudicating Indian reserved water rights.

2. Whether, assuming both the State and federal courts enjoy concurrent jurisdiction in the premises, a federal court whose jurisdiction is timely invoked by the United States or the affected Tribe for the sole pupose of quantifying Indian Reservation water rights should dismiss such an action in order to permit the State court to determine those rights in a general stream adjudication.

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OPINIONS BELOW

The opinion of the court of appeals in *San Carlos Apache Tribe* v. *Arizona* (81-2147 Pet. App. A) is reported at 668 F.2d 1093; that court's opinion in *Navajo Nation* v. *United States* (81-2147 Pet. App. B) is reported at 668 F.2d 1100; and the opinion of the same court in *Northern Cheyenne Tribe* v. *Adsit* (81-2188 Pet. App. 26-52) is reported at 668 F.2d 1080. The opinion of the district court in *San Carlos Apache Tribe* v. *Arizona* (81-2147 Pet. App. E) is reported at 484 F. Supp. 778 (D. Ariz.). The opinion of the district court in

Navajo Nation v. *United States* (81-2147 Pet. App. D) is unreported. The opinion of the district court in *Northern Cheyenne Tribe* v. *Adsit* (81-2188 Pet. App. 53-61) is reported at 484 F. Supp. 31 (D. Mont.).

JURISDICTION

The judgment of the court of appeals in *San Carlos Apache Tribe* v. *Arizona*, was entered on February 23, 1982, and in *Navajo Nation* v. *United States* on February 24, 1982. The petition for a writ of certiorari in No. 81-2147, covering both cases, was filed on May 12, 1982. The judgment of the court of appeals in *Northern Cheyenne Tribe* v. *Adsit* was entered on February 22, 1982. The petition for a writ of certiorari in No. 81-2188 was filed on May 21, 1982. Both petitions were granted on October 4, 1982, and the cases were consolidated. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

Section 20 of the Enabling Act for Arizona and New Mexico of June 20, 1910, ch. 310, 36 Stat. 569, and Article XX, Section 4, of the Arizona Constitution are reproduced in relevant part at 81-2147 Pet. 2-3. Section 4 of the Enabling Act for Montana (and other States) of Feb. 22, 1889, ch. 180, 25 Stat. 676-677, and Ordinance No. I of the Montana Constitution of 1889 and Article I of the Montana Constitution of 1972 are reproduced in relevant part at 81-2188 Pet. 3-4. The McCarran Amendment, Act of July 10, 1952, ch. 651, 66 Stat. 560, 43 U.S.C. 666, is reproduced at 81-2147 Pet. 3-4 and 81-2188 Pet. 4-5.

STATEMENT

This brief addresses two consolidated groups of cases presently before this Court: No. 81-2147, in which the Court is reviewing two judgments of the Court of Appeals

for the Ninth Circuit disposing of several Arizona cases; and No. 81-2188, in which the writ is addressed to a single judgment of the same court covering a number of Montana cases.

A. The Arizona Cases

1. *San Carlos Apache Tribe* v. *Arizona*

On March 7, 1979, six Indian tribes filed suit in the United States District Court for the District of Arizona seeking to prevent the adjudication of their rights to the water of the Salt, Verde and Gila River systems in State proceedings.[1] Some of the actions sought removal to the district court.[2] The other suits prayed for (1) a declaratory judgment that Arizona State courts lack jurisdiction to determine Indian water rights because of disclaimers of State jurisdiction over Indian lands contained in the Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, 569, and the State Constitution, Arizona Constitution, Article XX, Section 4, and (2) an injunction against further State court proceedings.[3] A month later, the Fort McDowell Mohave-Apache Indian Community and the San Carlos Apache Tribe filed actions asking the federal court to determine their rights in the Verde and Salt Rivers, respectively.[4]

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[1] The State proceedings were initiated pursuant to Arizona's water rights determination procedure. See Ariz. Rev. Stat. Ann. §§ 45-231 *et seq.* (1956), Ariz. Rev. Stat. Ann. §§ 45-251 *et seq.* (Cum. Supp. 1981).

[2] *White Mountain Apache Tribe Petition for Removal*, No. CIV 79-182 PHX VAC; *Gila River Indian Community Petition for Removal*, No. CIV 79-183 PHX VAC; *Salt River Pima-Maricopa Indian Community Petition for Removal*, No. CIV 79-184 PHX VAC.

[3] *Salt River Pima-Maricopa Indian Community* v. *Arizona*, No. CIV 79-185 PHX VAC; *San Carlos Apache Tribe* v. *Arizona*, No. CIV 79-186 PHX VAC (removal sought in the alternative); *Payson Community of Yavapai-Apache Indians* v. *Arizona*, No. CIV 79-187 PCT VAC (removal sought in the alternative).

[4] *Fort McDowell Mohave-Apache Indian Community* v. *Salt River Valley Water Users' Association*, No. CIV 79-267 PHX VAC (com-

The district court remanded the removed actions to State court and dismissed the other suits,[5] holding, *inter alia*, that the disclaimer provisions did not preclude State court jurisdiction over Indian water rights. The Tribes appealed from this decision, except for the remand of the removed actions. The appeals were consolidated in the court of appeals and were argued on July 15, 1981.

The same panel of judges which heard argument in the Arizona appeals (both *San Carlos Apache Tribe* v. *Arizona* and *Navajo Nation* v. *United States*) also heard argument on the same day in consolidated appeals from Montana, *Northern Cheyenne Tribe* v. *Adsit*, involving similar issues and now before this Court in No. 81-2188.

On February 23, 1982, the court of appeals rendered its decision in *San Carlos Apache Tribe* v. *Arizona*, reversing and remanding the decision of the district court. The Ninth Circuit held (81-2147 Pet. App. A-8 to A-9, A-11) that the disclaimer provisions in Arizona's Enabling Act and Constitution barred the State from asserting jurisdiction over Indian water rights. In reaching this result, the court adopted in full the reasoning on this point of its decision the day before in *Northern Cheyenne Tribe* v. *Adsit* (*id.* at C-3 to C-11). The court stated (*id.* at A-9) that, "[a]s in the *Northern Cheyenne* case, we find it necessary to remand for a determination of whether Arizona has obtained jurisdiction over the Indians pursuant to Public Law 280." The court noted (*id.* at A-10) that its holding on the disclaimer issue made it unnecessary for the court to decide whether dismissal under the doctrine of "wise judicial administra-

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plaint filed Apr. 13, 1979); *San Carlos Apache Tribe* v. *Arizona*, No. CIV 79-269 PHX CAM, and No. CIV 79-104 GLO MAR (complaints filed Apr. 16 and 17, 1979).

The *Fort McDowell* action was brought against several water users individually and as representative members of a defendant class of users (I J.A. 330).

[5] The only exceptions are the two *San Carlos Apache Tribe* suits cited in note 4, *supra*, which remain in abeyance before the district court, the time for service of process having been extended.

tion" would have been proper if Arizona had not disclaimed jurisdiction over Indian lands.

2. *Navajo Nation* v. *United States*

On April 17, 1979, the Navajo Tribe filed a complaint in the United States District Court for the District of Arizona, which as subsequently amended, requested a determination of the Navajo's rights in the Little Colorado River.[6] The district court stayed all proceedings in this action pending a State court general stream adjudication for the Little Colorado (81-2147 Pet. App. D-1). The Navajo Nation appealed. The Ninth Circuit reversed and remanded by decision of February 24, 1982 (*id.* at B-1), stating (*id.* at B-4) that its holding in *San Carlos Apache Tribe* v. *Arizona* that Arizona has disclaimed jurisdiction over Indian water rights compelled reversal of the district court's order. Because of this ruling on the disclaimer question, the court did not find it necessary to address other issues, including the United States' claim that sovereign immunity barred the Navajos from suing the United States in this action (81-2147 Pet. App. B-4).[7]

The United States was not a party to the *San Carlos Apache Tribe* group of cases, although it participated in the district court proceedings as *amicus curiae* in support of the Tribes. Being a defendant in *Navajo Nation*, the United States participated in the court of appeals as appellee in that case.

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[6] *Navajo Nation* v. *United States*, No. 79-276 PCT VAC (complaint filed Apr. 17, 1979). The complaint, as amended, named several water users as representative members of a defendant class of similarly situated users. This is the same approach taken in *Fort McDowell Mohave-Apache Indian Community* v. *Salt River Valley Water Users' Association* (*supra*, n.4).

[7] Judge Merrill dissented in the *San Carlos Apache Tribe* and *Navajo Nation* decisions (81-2147 Pet. App. A-11, B4), as he did in *Northern Cheyenne Tribe* (*id.* at C-18).

B. The Montana Cases

On January 30, 1975, the Northern Cheyenne Tribe brought an action [8] in the United States District Court for the District of Montana seeking an adjudication of its rights in certain streams in that State. Shortly thereafter, in the same year, the United States filed two suits [9] in the same district court seeking a determination of water rights on behalf of several Indian Tribes and on its own behalf. On April 5, 1979, the United States filed four other actions [10] in the same court also seeking a determination of Indian and non-Indian federally-owned rights in other Montana streams. Unlike the Arizona cases, all six of the actions filed by the United States requested a determination of the rights of all claimants on the named streams.[11]

On May 11, 1979, Montana enacted a new statutory scheme for the adjudication of water rights throughout the State.[12] Approximately six months thereafter, and almost five years after the filing of the Northern Cheyenne Tribe's suit, the district court, on November 29,

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[8] *Northern Cheyenne Tribe* v. *Tongue River Water Users Assn., et al.*, No. CIV-75-6-BLG.

[9] *United States* v. *Tongue River Water Users Assn., et al.*, No. CV-75-20-BLG (filed Mar. 7, 1975); *United States* v. *Big Horn Low Line Canal, et al.*, No. CV-75-34-BLG (filed Apr. 17, 1975).

[10] *United States* v. *Aasheim, et al.*, No. CV-79-40-BLG; *United States* v. *Aageson, et al.*, No. CV-79-21-GF; *United States* v. *AMS Ranch, Inc., et al.*, No. CV-79-22-GF; *United States* v. *Abell, et al.*, No. CV-79-33-M.

[11] The action brought by the Northern Cheyenne Tribe was consolidated with *United States* v. *Tongue River Water Users Assn., et al., supra.*

[12] See 1979 Mont. Laws ch. 697, §§ 1-38 ("Senate Bill 76") (81-2188 Pet. App. 102). Montana joined the United States as a defendant in its water rights proceedings under the authority of the McCarran Amendment, 43 U.S.C. 666.

1979, dismissed all of the actions in favor of State adjudicatory proceedings, to be conducted pursuant to the recently enacted water rights determination statute. In dismissing the suits, the district court relied on the "wise judicial administration" doctrine set out in *Akin* (see 81-2188 Pet. App. 60).

The United States and various Tribes [13] appealed. As we have noted, the same panel of the court of appeals which heard argument on July 15, 1981, in the consolidated Montana appeals also heard arguments on the same day in *San Carlos Apache Tribe* v. *Arizona* and *Navajo Nation* v. *United States, supra.*

On February 22, 1982, the court of appeals issued its decision (81-2188 Pet. App. 26). The court determined (*id.* at 31) that the McCarran Amendment, 43 U.S.C. 666, had not repealed the disclaimer of State jurisdiction over Indian lands contained in Montana's Enabling Act and Constitution. Without finally deciding the point, the court found no indication that Montana had otherwise validly repealed the disclaimer (81-2188 Pet. App. 31-38). The court ultimately held (*id.* at 38-39) that even if it were determined that Montana had effectively assumed concurrent jurisdiction, the district court's ruling must be vacated because the doctrine of "wise judicial administration" relied on in *Akin* did not support dismissal. Accordingly, the court of appeals reversed, concluding that the governing factors "favor retention of federal jurisdiction" (*id.* at 45).[14]

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[13] Besides the Northern Cheyenne Tribe, other Tribes participated in the district court proceedings; these Tribes intervened as plaintiffs in the district court, or as appellants in the court of appeals, or sought permission to so intervene.

[14] Judge Merrill dissented (81-2188 Pet. App. 46, 48) on both the disclaimer and "wise judicial administration" issues.

ARGUMENT

INTRODUCTION AND SUMMARY

Here, as all too often, the will of Congress is not clearly revealed, and it ultimately falls to this Court to determine congressional intent from sometimes contradictory indications embodied in a variety of statutes, some of different periods and others almost contemporaneous, all speaking indirectly to the discrete question presented by these cases, but none so narrowly focussed on the particular problem as to be obviously controlling. Specifically, the two issues presented are: whether unrepealed provisions of the Enabling Acts for the admission of most Western States (including Arizona and Montana) disclaiming "jurisdiction" over Indian lands, were in part overridden by the McCarran Amendment of 1952 so as to permit State courts to adjudicate water rights held by the United States on behalf of Indians or Indian Tribes in such States; and, if so, whether a persistent legislative tradition exempting restricted Indian property, including water rights, from State adjudication, apparently preserved by Public Law 280 in 1953 and re-inforced by the enactment of 28 U.S.C. 1362 in 1966, counsels a federal court whose jurisdiction is timely invoked for the discrete purpose of quantifying Indian water rights, not to abdicate the task in deference to newly filed State proceedings. We answer both questions in the affirmative. That resolution, we believe, most nearly accommodates the competing concerns that underlie congressional policy in this difficult context.

A.

The first issue, we submit, is ultimately controlled by the Court's recent decision in *Colorado River Water Conservation District* v. *United States* (hereinafter "*Akin*"), 424 U.S. 800 (1976). It was there held that the McCarran Amendment, 43 U.S.C. 666, conferred on State courts concurrent jurisdiction to adjudicate Indian water rights in a general stream adjudication. To be sure, *Akin* arose in Colorado, a State which had not expressly disclaimed

jurisdiction over Indian lands, whereas the present cases involve States admitted on condition that, absent congressional consent, they would not assert jurisdiction over Indian lands. In our view, however, that difference ought not produce disparate procedural rules in disclaimer and non-disclaimer States.

We reach this conclusion primarily because any other result would trivialize the *Akin* ruling. Indeed, of all the Western States where water is an acute problem, only four are non-disclaimer States, and more than nine-tenths of Indian lands—with their appurtenant water rights—lie in disclaimer States.

What is more, there is no apparent reason for attributing to Congress an intent to treat the States differently in respect of jurisdiction over Indian water rights, depending upon the conditions imposed by their respective Enabling Acts. On the contrary, the familiar disclaimer clauses seem to reveal no more than a historical pattern initiated in 1889 and followed thereafter, but reflecting no change of policy. Arguably, the disclaimer clauses merely state explicitly a general rule, denying State court jurisdiction over Indian real property rights, that applied in all States, including those admitted before 1889. But, so far as water rights are concerned, *Akin* holds that the McCarran Amendment has lifted any such obstacle, and we cannot reasonably confine the effect of that decision, and of the Amendment itself, to the relatively few Indian Reservations outside disclaimer States.

B.

While conceding State jurisdiction, the Court in *Akin* equally clearly re-affirmed the unimpaired concurrent jurisdiction of the federal courts. Thus, the question arises whether an action timely filed in the federal forum ought to be dismissed in favor of a State proceeding initiated contemporaneously. In the special case of Indian water rights, we believe the McCarran Amendment does not require that result and that other concerns counsel the exercise of jurisdiction by the federal courts to perform that discrete task.

Our submission is informed by three considerations, which we discuss in turn.

1. First (pages 16-23, *infra*), we notice the long and continuing tradition of insulating Indian Reservation rights from State authority, including the jurisdiction of State courts, and the consistent practice of this Court to construe cautiously congressional legislation relinquishing the protective umbrella of federal law and federal courts. This, we suggest, counsels against reading the McCarran Amendment as requiring abdication of federal jurisdiction except where necessary to accomplish its limited objective.

2. Second (pages 23-27, *infra*), we address the question left unresolved by *Akin*: the situation in which the Tribe, rather than the United States, invokes the federal forum. In light of the explicit right of self-representation confirmed to Indian Tribes and the unfettered access to the federal courts granted by Congress in Section 1362 of the Judicial Code, we are reluctant to construe the McCarran Amendment as defeating those privileges in respect of water rights—perhaps the most valuable asset of the Western Tribes. Nor do we believe the result should be different because the United States champions the tribal claims—unless the Tribe and the United States are content to submit those water rights to State adjudication.

3. Finally (pages 27-35, *infra*), we turn to the policies of the McCarran Amendment to determine whether the solution proposed, because of duplication, or undue burdens or delays, would enervate the congressional objective. We conclude no serious problem is created, provided the jurisdiction of the federal court is promptly invoked and its judgment is incorporated into the eventual State court decree and is made subject to administration by the appropriate State authorities.

4. It remains only to apply the suggested rule to the suits now before the Court (pages 35-38, *infra*). The procedural history of the cases amply demonstrates that federal jurisdiction was timely invoked in each instance.

But, if our submission is correct, the pleadings, in some of the cases, require amendment, either by restricting the prayer to seek a federal court adjudication of Indian rights only, or by explicitly asking a quantification of those rights and joinder of the United States as a party. With these modifications, we conclude that the judgments below should be affirmed and the several district courts should be directed to proceed.

I. STATE COURTS HAVE JURISDICTION TO ADJUDICATE INDIAN WATER RIGHTS EVEN IN DISCLAIMER STATES

In *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), this Court unanimously held that the McCarran Amendment, 43 U.S.C. 666, conferred upon State courts concurrent jurisdiction to determine reserved water rights held by the United States on behalf of Indians or Indian Tribes as part of a general stream adjudication. The first question presented in the cases now before the Court is whether that rule applies in States which, like Arizona and Montana but unlike Colorado involved in *Akin*, were required by the Enabling Acts authorizing their admission to the Union expressly to disclaim "jurisdiction and control" over Indians lands.

There is force to the proposition that neither the McCarran Amendment nor any other provision of federal law has removed the jurisdictional obstacle of such Indian disclaimer clauses as applied to water rights, a species of restricted real property. We have sketched the affirmative argument in the Memorandum we filed in response to the petitions (at 9-12) and it is elaborated in the Brief of Respondent Crow Tribe of Indians. At the end of the day, however, we believe there is intolerable tension between the rule of *Akin* for non-disclaimer States and a different rule for disclaimer States.

1. The fact is that, in the West, where most Indians live and water is scarce, disclaimer provisions are the

norm, not the exception. Of the twelve States west of the 100th Meridian (including Alaska but not Hawaii), all but four—California, Oregon, Nevada and Colorado—are disclaimer States. So are three other States with substantial Indian populations: North Dakota, South Dakota and Oklahoma.[15] Almost half the Indians live in disclaimer States. See U.S. Dep't of Commerce, *Statistical Abstract of the United States 1981*, Table 36, at 32 (102 ed. 1982). And, perhaps most significant because Indian water rights are usually measured in accordance with irrigable acreage rather than population, more than nine-tenths of Indian land (excluding Alaska)—including the 21 largest Indian Reservations—lie in disclaimer States. See *id.* Table 389, at 228; U.S. Dep't of Commerce, *Federal and State Indian Reservations* (1974).

The upshot is that confining the *Akin* ruling to the non-disclaimer States is to relegate it to relative insignificance. To paraphrase the words of that decision (424 U.S. at 811), it is difficult to avoid the conclusion that "a construction of the [unanimous *Akin* decision] excluding [Indian water rights in disclaimer States] from its coverage would enervate the [decision's] objective."

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[15] In the order of their admission to the Union, the eleven disclaimer States are: North Dakota, South Dakota, Montana and Washington (all covered by the Enabling Act of Feb. 22, 1889, ch. 180, 25 Stat. 676), Idaho (Admission Act of July 3, 1890, ch. 656, 26 Stat. 215), Wyoming (Admission Act of July 10, 1890, ch. 664, 26 Stat. 222), Utah (Enabling Act of July 16, 1894, ch. 138, 28 Stat. 108), Oklahoma (Enabling Act of June 26, 1906, ch. 3335, 34 Stat. 270), New Mexico (Enabling Act of June 20, 1910, ch. 310, 36 Stat. 558-559), Arizona (Enabling Act of June 20, 1910, ch. 310, 36 Stat. 569-570), and Alaska (Enabling Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, as amended by Pub. L. No. 86-70, 73 Stat. 141). In the case of Idaho and Wyoming, the Indian disclaimers are to be found only in their respective Constitutions (Idaho Const., Art. 21, § 19; Wyoming Const., Art. 21, § 26), but, presumably, those provisions, submitted to Congress for approval before admission, were effectively required as a condition of statehood. See *Kake Village* v. *Egan*, 369 U.S. 60, 68 (1962). For the special case of Kansas, of little practical importance today, see note 16, *infra*.

2. There is, moreover, no apparent justification for different treatment of disclaimer States and other States with Indian Reservations. So far as we can discern, Congress made no policy decision to retain exclusive federal jurisdiction of Indian property interests in some States, but not in others. The historical fact is that, from 1889 onwards, every newly admitted State was required to disclaim jurisdiction over Indian Reservations.[16] Apparently, Congress was reacting to the then recent decision in *United States* v. *McBratney*, 104 U.S. 621 (1882), where the Court, condoning the exercise of State authority within an Indian Reservation, pointedly noted that jurisdiction over Indian lands had not been excluded when the State of Colorado was admitted and seemed to open the door to general State jurisdiction. *Id.* at 623-624. See Gold-

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[16] Although the first disclaimer clause in the familiar language involved here is to be found in the 1889 Enabling Act for the admission of Washington, North Dakota, South Dakota and Montana, there were precedents of some relevance. In several Acts of Congress establishing territorial governments, Congress inserted a proviso preserving "the rights of person or property now appertaining to any Indians," including treaty rights, and reserving "the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights." See, *e.g.*, 5 Stat. 11 (1836, Wisconsin Territory); 5 Stat. 235 (1838, Iowa Territory); 9 Stat. 323 (1848, Oregon Territory). More significant, perhaps, is the Act of Admission for the State of Kansas in 1861, which, in addition to preserving "the rights of person or property now pertaining to the Indians," wholly exempted from State jurisdiction, as "no part of the State," "any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory." 12 Stat. 127. It is not clear, however, whether the latter provision, referring to the Treaty with the Shawnees of 1831 (7 Stat. 357), ever had any bite in light of a later treaty of 1854. When the Court came to decide the case of *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866), this disclaimer was noted (*id.* at 739, 740-741), but the Court rested its result on the more general recognition of Indian property in the Act of Admission and the protective jurisdiction of the United States. *Id.* at 755-757.

berg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 570 (1975).

In short, the disclaimer provisions appear to be an express confirmation of the general rule, not the fashioning of a new principle. And, indeed, the Court itself, both before and after the first disclaimer clauses were written in 1889, made clear that absence of an express disclaimer did not oust federal jurisdiction or subject Indian land to State authority. See, *e.g.*, *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), 108 U.S. 491 (1883) (Minnesota); *United States* v. *LeBris*, 121 U.S. 278 (1887) (Minnesota); *United States* v. *Kagama*, 118 U.S. 375 (1886) (California); *Donnelly* v. *United States*, 228 U.S. 243 (1913) (California).

3. Accordingly, we believe it would be wrong to follow a different procedural rule in the disclaimer States on the ground that Congress meant to treat them with special distrust in Indian matters. We are therefore confronted with two alternatives: (1) to read the Enabling Act disclaimers as reflecting a *general* congressional policy to oust State jurisdiction over Indian Reservation property interests, including water rights, and to conclude that this rule, as applicable to Reservation water, was not effectively revoked by the McCarran Amendment or by Public Law 280; or (2) to construe the McCarran Amendment as conferring on State courts competence to adjudicate Indian water rights in all States, and, to that extent, impliedly removing the Enabling Act impediments.

It is too late in the day to suggest the first course. Indeed, once it was determined that the McCarran Amendment reached not only water rights acquired by the United States under State law, but also "reserved" federal water rights (*United States* v. *District Court for Eagle County*, 401 U.S. 520 (1971)), "the logic of those cases" extended to reserved water rights held by the United States on behalf of Indian Reservations wherever located. See *Akin*, *supra*, 424 U.S. at 810. Assuming an underlying policy

of the McCarran Amendment to permit the contemporaneous adjudication of all competing claims to the water of a single stream system, it makes little practical sense to exempt Indian water rights in disclaimer States, where, as it happens, most such rights arise. At least when the jurisdiction of a federal court is not promptly invoked to quantify Indian Reservation rights, the objective of the McCarran Amendment, as declared by this Court, would be defeated if State courts were powerless to perform the task. Thus, the momentum of the Court's past decisions carries the day against the disclaimer ruling below.

4. Conceding the concurrent jurisdiction of the State courts in all States does not, however, resolve the question whether a federal court, whose jurisdiction is timely invoked, ought to refuse to proceed. In *Akin*, while stressing "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" and cautioning that only "exceptional" circumstances and "the clearest of justifications" will warrant dismissal of the federal suit (424 U.S. at 817, 818, 819), the Court articulated certain factors that will justify a federal court in declining to entertain an action for the adjudication of Indian Reservation water rights. *Id.* at 818-820. After some experience under this regime, we deem it appropriate to ask the Court to clarify this aspect of the *Akin* decision. The balance of our brief is devoted to articulating a proposed solution.

II. A FEDERAL COURT WHOSE JURISDICTION IS TIMELY INVOKED SHOULD ADJUDICATE INDIAN WATER RIGHTS

While fully accepting the basic ruling of this Court in *Akin* that State courts enjoy concurrent jurisdiction to adjudicate reserved water rights held by the United States on behalf of Indians or Indian Tribes, we believe that, in the particular case of Indian water rights, special concerns require a federal court whose jurisdiction is timely in-

voked, whether by the United States or a Tribe, to proceed to adjudicate those claims.

A. The tradition of federal jurisdiction in Indian affairs argues in favor of federal court adjudication of tribal water rights

1. At least since the Constitution removed the "shackles" on national power that theretofore had maintained an ambiguous regime of divided authority between State and federal governments over Indian affairs (*Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 558-560 (1832); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866)), it has been accepted that Indian Tribes within their own territory are largely insulated from State jurisdiction. *E.g.*, *Rice* v. *Olson*, 324 U.S. 786, 789 (1945); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 168, 174-175 (1973); *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 and n.2 (1975); *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n.2 (1976); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979). In important measure, national policy has permitted the Tribes to retain their aboriginal sovereignty, over their members, their lands, their water, their natural resources, and over activities occurring on their territory that significantly implicate tribal interests. *Williams* v. *Lee*, 358 U.S. 217, 220, 223 (1959); *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690 (1965); *United States* v. *Mazurie*, 419 U.S. 544, 557-558 (1975); *United States* v. *Wheeler*, 435 U.S. 313, 324 (1978); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56, 59, 65-66 (1978); *Washington* v. *Confederated Tribes*, 447 U.S. 134, 152-154 (1980); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142, 151 (1980); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137-144, 146-148 (1982). At the same time, Indian Tribes are dependent on the national government and subject to its plenary power. *United States* v. *Kagama*, 118 U.S. 375, 383-385 (1886); *Oli-*

phant v. *Suquamish Indian Tribe*, 435 U.S. 191, 207-212 (1978); *United States* v. *Wheeler*, *supra*, 435 U.S. at 323, 327-328, 331; *Washington* v. *Confederated Tribes*, *supra*, 447 U.S. at 154. But, except as Congress has provided otherwise, tribal Indian communities remain in most respects apart from the State in which they reside. Anomalous as it may seem, this is the rudimentary principle from which all our law concerning Indian affairs derives. In these cases, as in all others, it must be the starting point.

2. Of course, the wall separating Indian enclaves from State interference is no longer absolute. Where tribal interests are unaffected or relatively minor, the State has been allowed to punish or tax or regulate non-Indians within a Reservation. *E.g.*, *United States* v. *McBratney*, 104 U.S. 621 (1882); *Utah & Northern Ry.* v. *Fisher*, 116 U.S. 28 (1885); *Thomas* v. *Gay*, 169 U.S. 264 (1898); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes*, *supra*; *Montana* v. *United States*, *supra*. And, in specific contexts, State law has been imported to govern the Indians themselves. *E.g.*, 25 U.S.C. 231, 232-233. What is more, in two relatively short-lived and later repudiated experiments (exemplified by the General Allotment Act of 1887 and Public Law 280 of 1953), Congress has invited in State jurisdiction more generally. But, however many the gates that have been opened, the Reservation wall stands and cannot be scaled or breached with impunity.

Thus, to this day, sovereign immunity shields Indian Tribes from State suits. See *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165 (1977); *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 58. States and their non-Indian citizens may not acquire Indian land without federal permission (25 U.S.C. 177; see *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974)); traders may not enter a Reservation without a federal or tribal license (25 U.S.C. 261-264; see *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U.S. 160 (1980)); and, indeed, except as federal or tribal

law grants special leave, all non-members may be excluded from tribal lands (see *Merrion* v. *Jicarilla Apache Tribe*, *supra*). The State may not tax Indian Reservation land or personal property or income (see *McClanahan* v. *Arizona State Tax Commission*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, *supra*; *Bryan* v. *Itasca County*, *supra*), or most on-Reservation dealings with the Tribe even when the legal incidence of the tax falls on non-Indians (see *White Mountain Apache Tribe* v. *Bracker*, *supra*; *Ramah Navajo School Board* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982)). Except where the State has timely accepted Congress' invitation to assert jurisdiction, crimes involving Indians within "Indian country" are the exclusive concern of federal or tribal law and federal or tribal courts. 18 U.S.C. 1152-1153; see *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *United States* v. *John*, 437 U.S. 634 (1978). Nor may the State regulate the activities of tribal members within the Reservation (see *Fisher* v. *District Court*, 424 U.S. 382 (1976); *Montana* v. *United States*, *supra*), or, for the most part, the intercourse there between Indians and others (see *Williams* v. *Lee*, *supra*).

The upshot is that, even today, the application of State law and the jurisdiction of State courts with respect to Indian affairs is the exception, not the rule. And, of special relevance here, exemption from State authority has usually included its judicial tribunals, whether or not bound to apply federal substantive law. *E.g.*, *McKay* v. *Kalyton*, 204 U.S. 458 (1907); *Minnesota* v. *United States*, 305 U.S. 382 (1939); *Williams* v. *Lee*, *supra*; *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971); *Fisher* v. *District Court*, *supra*. Indeed, when opening the federal courts more widely to tribal claims by enacting 28 U.S.C. 1362 in 1966, Congress stressed the importance to the Tribes of avoiding the State courts. S. Rep. No. 1507, 89th Cong., 2d Sess. 2-3 (1966); H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2-3 (1966). And this Court has likewise pointed to the availability of a federal forum to adjudicate Indian property rights as a significant safeguard. See

Oneida Indian Nation v. *County of Oneida*, *supra*, 414 U.S. at 676, 678-682; *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 673-674 (1979).

3. What is more, whenever the national government has determined upon a policy of relinquishing its monopoly over Indian affairs, Congress has been explicit in its cession and punctilious about the timing and conditions for the transfer. See *Williams* v. *Lee*, *supra*, 358 U.S. at 220-221; *Kennerly* v. *District Court of Montana*, *supra*, 400 U.S. at 424-429; *McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 177; *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 381, 389-390. Even the General Allotment Act of 1887, while contemplating the eventual dissolution of Indian Reservations and the application of State law to both the allotted and alienated lands, was careful to preserve the protective umbrella of federal law for a generation (25 U.S.C. 348, 349), subject to extensions which ultimately carried into the indefinite future. See *Mattz* v. *Arnett*, 412 U.S. 481, 496 & nn. 17 & 18, 497 (1973). And, at the same period, beginning in 1889, Congress insisted that newly admitted States formally and irrevocably disclaim "jurisdiction and control" over Indian lands "until the title thereto shall have been extinguished by the United States." *E.g.*, Section 4 of the Enabling Act of Feb. 22, 1889, ch. 180, 25 Stat. 676-677, for North Dakota, South Dakota, Montana and Washington; Sections 2 and 20 of the Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, 558-559, 569-570, for New Mexico and Arizona. So, also, when the Congress of 1953 authorized the States to assume general criminal and limited civil jurisdiction within "Indian country," it expressly withheld certain matters—including water rights (25 U.S.C. 1322(b); 28 U.S.C. 1360(b))—and required most States to take positive legislative action where they were free to assert authority. Act of Aug. 15, 1953, ch. 505, Sections 6 and 7, 67 Stat. 590; see *Kennerly* v. *District Court of Montana*, *supra*; *Washington* v. *Yakima Indian Nation*, *supra*.

Nor has Congress abandoned this cautious approach. On the contrary, the pattern has been to restrict, or even reverse, the force of assimilationist legislation. Thus, the allotment policy was delayed by repeated extensions of the trust period and finally ended by enactment of the Indian Reorganization Act in 1934, 25 U.S.C. 461 *et seq.* See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-152 (1973); *Mattz* v. *Arnett*, *supra*, 412 U.S. at 496 & nn. 17 & 18. And, beginning in the mid-1960's, Congress repudiated another "termination" era by once again committing the Nation to encouraging and protecting the autonomy of Indian Tribes. In 1966, the doors of the federal courts were opened wider to tribal claims. 28 U.S.C. 1362; see *Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at 472-475. In 1968, Public Law 280 was amended to require tribal consent before a State could assume jurisdiction within an Indian Reservation (25 U.S.C. 1322(a), 1326; see *Kennerly* v. *District Court of Montana*, *supra*, 400 U.S. at 428-430), and the Indian Civil Rights Act was enacted. 25 U.S.C. 1301-1303; see *Santa Clara Pueblo* v. *Martinez*, *supra*. Several terminated Tribes have been restored to their former status and territory. *E.g.*, Menominee Restoration Act of 1973, 25 U.S.C. 903 *et seq.* And, still more recently, Congress has carried forward the same goals in the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.* See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 388-389 n.14; *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 143 and n.10; *Ramah Navajo School Board* v. *Bureau of Revenue*, *supra*, slip op. 7-8.

It hardly needs saying that this Court has generously accepted the political decision to foster tribal self-government and self-sufficiency, largely free from State interference. Accordingly, legislation looking in the opposite direction has been read cautiously and ambiguities have been resolved against conceding jurisdiction to State authorities, including State courts. As early as 1907, the Court declined to read an ambiguous statute, now 25

U.S.C. 345, as granting State tribunals power to adjudicate a claim to an allotment. *McKay* v. *Kalyton*, *supra*. In *Minnesota* v. *United States*, *supra*, a provision permitting condemnation of Indian land "under the laws of the State," 25 U.S.C. 357, was construed to require resort to a federal court. See, also, *United States* v. *Clarke*, 445 U.S. 253, 254 (1980). A Termination Act was held not to abrogate the Tribe's privilege of hunting and fishing free of State regulation. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). Effect was denied to a purported assumption of State jurisdiction because of failure to follow required procedures. *Kennerly* v. *District Court of Montana*, *supra*. The Court declined to read legislation "opening up" a Reservation as intending to disestablish it and subject it to State law. *Mattz* v. *Arnett*, *supra*. So, also, restrictive effect was given to Section 6 of the General Allotment Act of 1887, 25 U.S.C. 349, in light of later enactments. *Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at 477-479. And the general terms of Public Law 280 were construed as not embracing State taxing power. *Bryan* v. *Itasca County*, *supra*.

4. In light of this tradition, it is somewhat surprising to find that a very bare statute of 1952—which does not mention Indians and, on its face, only addresses the sovereign immunity of the United States—has silently subjected Indian water rights to State jurisdiction. But, accepting the basic holding of *Akin* that, through the McCarran Amendment, Congress authorized this result, it would be extravagant to read that enactment as intending to overturn the usual rule beyond what is required to satisfy the limited purpose of the legislation. Especially is this so when we remember that, only a year later in Public Law 280, Congress explicitly reserved Indian water rights from State adjudication. 25 U.S.C. 1322(b); 28 U.S.C. 1360(b).

To be sure, this Court has ruled that Public Law 280's specific exemption of Indian water rights from State court adjudication does not "limit the special consent to jurisdiction given by the McCarran Amendment." *Akin*, *supra*,

424 U.S. at 813 n. 20. But this does not authorize us wholly to disregard the explicit reluctance of a contemporaneous Congress to entrust to State adjudication tribal restricted property, including water rights, except when necessary.[17] Plainly, our duty is to accommodate the continuing tradition of exempting Indian property rights from State authority—whether legislative or judicial—with the goal of the McCarran Amendment to assure that water rights held by the United States, including those held on behalf of Indian Tribes, do not escape timely adjudication.

Our submission is an attempt to reconcile these competing concerns. On the one hand, we concede the unfettered jurisdiction of State courts to join the United States in a general stream adjudication, both as trustee

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[17] It should be noted that the Public Law 280's exemption of water rights and other restricted Indian property from the jurisdiction of State courts was not an afterthought. Most of the early bills, it is true, focused exclusively on criminal jurisdiction. See *State Legal Jurisdiction in Indian Country: Hearings on H.R. 459, H.R. 3235 and H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 82d Cong., 2d Sess. 1-2, 9-10 (1952) (hereinafter "*1952 Hearings*"). But as early as mid-1951, Congress had before it a draft, endorsed by the Department of the Interior, that provided for ceding civil jurisdiction with an explicit exception for "any civil action, probate, or other proceeding affecting the ownership, title, possession, or any other interest" in "any property, real or personal, including water rights, belonging to any Indian or Indian Tribe, band, group, or community [that is] held in trust by the United States or [is] subject to restrictions against alienation." *1952 Hearings* at 103-104.

With immaterial changes, that provision was included in every subsequent draft submitted to Congress by the Interior Department. See *1952 Hearings* at 28-30; *Hearings on H.R. 1063 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 19-21 (June 29, 1953, unpublished but, once again, lodged with the Court). Nor did the provision pass unnoticed. It was highlighted by the Interior Department spokesman at the June 29, 1953 Hearings (at 19-21), and was included in the bill reported by both the House and Senate Committees. See H.R. Rep. No. 848, 83d Cong., 1st Sess. 2, 10 (1953); S. Rep. No. 699, 83d Cong., 1st Sess. 3, 9 (1953).

for Indians or Indian Tribes and as holder of other rights, and to proceed to quantification if no federal proceeding has been initiated or promptly intervenes. On the other hand, we submit that a federal court whose jurisdiction is timely invoked has a duty to perform the limited role of quantifying Indian water rights—a discrete task that will not duplicate and need not delay the general State adjudication. See Point C, *infra*. Ultimately, the federal judgment can be incorporated in the comprehensive State court decree, which will be administered by State authorities, subject only to the power of the federal court to assure implementation of its judgment. In this way, two apparently conflicting congressional mandates both can be faithfully executed.

B. The Tribes' rights of self-representation and unfettered access to a federal forum argue in favor of federal court adjudication of tribal water rights

There is another reason for insisting that a federal court proceed to adjudicate tribal water rights when its jurisdiction is timely invoked. It rests on the tribal prerogative of self-representation and unfettered access to the federal forum expressly confirmed by Congress in 28 U.S.C. 1362. If those rights are to be taken seriously, they ought not be vulnerable to effective defeasance by the simple expedient of joining the United States as guardian of the Tribe in State court. Thus, when an Indian Tribe seeks quantification of its reserved water rights in federal court, we submit that court cannot abdicate its jurisdiction. Indeed, in *Akin*, this Court was careful to distinguish that situation. 424 U.S. at 820 n.26. But we go further, joining Justice Stevens in suggesting that it would be anomalous to require a different result when the United States is the federal court plaintiff, suing on behalf of the Tribe. See 424 U.S. at 827.

1. It was once usual for Indian Tribes to be viewed as incompetent "wards" of the National Government, on whose behalf the United States appeared as "guardian" to assert or defend tribal property rights in its own name.

See, *e.g.*, *United States* v. *Rickert*, 188 U.S. 432 (1903); *Heckman* v. *United States*, 224 U.S. 413 (1912); *United States v. Minnesota*, 270 U.S. 181, 193-195 (1926). But, increasingly since the passage of the Indian Reorganization Act in 1934, 25 U.S.C. 461 *et seq.*, Tribes have become involved in administering their own property and vindicating their rights through their own attorneys. This trend was given important congressional endorsement in 1966 by the addition of Section 1362 to the Judicial Code. As a result, Indian Tribes today are fully authorized to prosecute their own claims judicially and commonly do so, especially when the United States—for whatever reasons—declines to take the initiative. See *Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at 472-475.

Unless it is unavoidable, this right of self-representation ought not to be sacrificed in respect of a resource so vital as water. No doubt, most State courts would permit intervention by affected Tribes. Yet, it is not safe to assume that none will accept the argument of the State parties in the recent proceedings in *Arizona* v. *California*, No. 8, Original (argued Dec. 8, 1982), resisting tribal intervention on the ground that, under *Heckman*, the representation of the United States is "complete." See 224 U.S. at 444-446. At all events, the Tribes would be required to waive their own sovereign immunity—unaffected by the McCarran Amendment—in order to participate in a proceeding not of their choosing. That is hardly according full effect to the principle of tribal sovereignty or to the congressional policy reflected in Section 1362.

There is, moreover, good reason to concede the leading role to tribal counsel when the Tribe prefers to advocate its own rights and the United States is content to acquiesce in that course. We are far from suggesting any disabling conflict of interest on the part of the federal government.[18] But there is no denying that past defaults by

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[18] Even when there are other claims to water by the United States on the same stream, attorneys for the government represent a single party—the United States—which, by law, has two interests in the case, arising from its capacity as trustee with respect to the lands

agencies of the United States in vindicating Indian rights, as well as the continuing competition for water by other federal programs, have engendered doubts concerning federal representation of the Tribes in some instances. In such circumstances, mutual trust and the appearance of justice are better served by permitting the Tribe to prosecute its own claims. See *Poafpybitty* v. *Skelly Oil Company*, 390 U.S. 365, 368-372, 374 (1968); cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-539 (1972).

In order to assure a binding judgment, the United States should be a party to the proceeding. See pages 30-31 and note 22, *infra*. And, in any event, the government will always have a right to participate and, indeed, a duty to assure itself that the rights it holds on behalf of the Tribe are adequately protected. But performance of that obligation may not inevitably call for separate advocacy by government counsel. On the other hand, if the affected Tribe does not itself seek quantification of its water rights and deters the government from invoking federal jurisdiction for that purpose, the policy of the McCarran Amendment may require those claims to be presented by the United States as a defendant in State proceedings. See our Brief in Opposition (filed Sept. 1982) in *White Mountain Apache Tribe* v. *Smith*, No. 81-2334, petition for cert. pending. All we suggest is that the Tribe ought to have the *opportunity* to exercise its prerogative of self-representation by timely instituting an action to adjudicate its water rights.

2. An equally important aspect of Section 1362 is the widened access it gave to a *federal* forum. There is no doubt that the Congress of 1966 was quite deliberately opening the federal courts to tribal claims because, in its

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in which Indians have a beneficial interest and its capacity as owner of the other federal lands involved. Congress has provided that the Attorney General or attorneys subject to his supervision shall appear on behalf of the United States in cases in which it has an interest. 28 U.S.C. 516 and 519. The attorneys for the United States therefore must represent the position of the United States that reflects its several capacities or interests.

view, that was the appropriate and preferred forum for such an adjudication. Among the reasons cited were the long "tradition" of committing Indian claims to federal courts, their greater "expertise" in deciding these issues, and the "reluctance" of the Tribes to submit themselves to State jurisdiction. H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2-3 (1966); S. Rep. No. 1507, 89th Cong., 2d Sess. 2-3 (1966). As the Interior Department communication annexed to Senate Report summed it up, "[t]he issues involved are Federal issues and the tribes should not be required to conduct the litigation in the State courts." S. Rep. No. 1507, *supra*, at 3; see also, H.R. Rep. No. 2040, *supra*, at 3.

There is certainly no basis for excepting tribal water rights claims from the scope of Section 1362. Like Section 1345 of the Judicial Code—applicable to suits by the United States—Section 1362 is untouched by the McCarran Amendment. See *Akin*, *supra*, 424 U.S. at 806-809; *Cappaert* v. *United States*, 426 U.S. 128, 145-146 (1976). And see *Akin*, *supra*, 424 U.S. at 809 n.15 (Section 1331 also unaffected). Hence, we must give it such effect as we can in the present context. Except as a clear mandate demands it, the special solicitude of Congress to afford the Tribes unrestricted access to the federal courts to vindicate their property rights ought not to be vitiated by a construction of the McCarran Amendment that requires Indian water rights to be adjudicated in State courts as against the United States as trustee. Cf. *Moe* v. *Salish & Kootenai Tribe*, *supra*, 425 U.S. at 477-479.

3. We conclude that where a Tribe has timely exercised its privilege of invoking the jurisdiction of the federal court in its own name, it would be contradictory to require dismissal of that suit and to compel the Tribe to submit unwillingly to the presentation of tribal claims by the United States in the State forum. What is more, with respect to Indian water rights, we cannot justify a different result merely because the United States is the plaintiff, pressing the tribal claims. The solution, we submit, is not to make the result turn upon whether the United States or the Tribe invokes federal jurisdiction.

In our view, Justice Stevens was right in suggesting that avoidance of such an anomaly argues for a rule that requires federal courts to adjudicate Indian Reservation water rights when their jurisdiction is timely invoked, whether by the Tribe or the United States. See 424 U.S. at 827.

C. Timely federal court adjudication of Indian water rights does not enervate the policy of the McCarran Amendment or involve duplication, undue burdens or delays

However faithfully it may carry forward the tradition of preferring federal adjudication of tribal rights and implement the privilege of a federal forum Congress opened to the Tribes for their vindication, our submission must be rejected if the McCarran Amendment clearly requires a different result. So, also, we recognize that practical difficulties—duplication, undue burdens or delays—would weigh against an otherwise attractive option. But, in our view, there are no serious impediments in the way of the solution we propose.

1. The central concern of the McCarran Amendment was to end the regime under which the United States, standing on its sovereign immunity, could remain aloof while the relative rights of all other users on a stream system were adjudicated. Not bound by the decree controlling others, federal officials could satisfy the needs of federal establishments in a way that impinged on competing claimants; or, at least, the potential of such action rendered the decreed rights insecure. See S. Rep. No. 755, 82d Cong., 1st Sess. 5-6, 9 (1951). Moreover, the United States could later have its own water rights determined in a judgment that might be at odds with the prior general decree. See *Departments of State, Justice, Commerce and the Judiciary, Appropriations for 1953: Hearings on H.R. 7289 Before the Senate Comm. on Appropriations*, 82d Cong., 2d Sess. 1349 (1952); *Adjudication of Water Rights: Hearings on S. 18 Before the Senate Comm. on the Judiciary*, 82d Cong., 1st Sess. 49 (1951).

To be sure, the United States often solved the problem by itself provoking a general stream adjudication. But there were sufficient abuses to persuade Congress that a remedy was required.

The solution was to lift the sovereign immunity of the United States when its participation was necessary to the complete adjudication of competing rights on a stream. And, as this Court has held, the waiver reaches even reserved water rights of the government, including those it holds on behalf of Indians. *United States* v. *District Court for Eagle County*, 401 U.S. 520 (1971); *United States* v. *District Court for Water Division No. 5*, 401 U.S. 527 (1971); *Akin*, *supra*. As these decisions make clear, the sovereign immunity of the United States was lifted in both federal and State courts. But the continuing jurisdiction of federal courts was left unimpaired. *Akin*, *supra*, 424 U.S. at 806-809.

Our submission is entirely consistent with these principles. We fully accept that it is intolerable to permit unquantified Indian water rights indefinitely to cast a shadow over competing diversion claims simply because neither the United States nor the Tribe is ready or willing to submit the matter to adjudication in any forum. Accordingly, we deem it right to say to the United States and the Tribe: Either of you may obtain a determination of Reservation water rights in the federal forum, but, if you do not act promptly, those rights must be adjudicated in the State proceeding. On the other hand, the McCarran Amendment announces no preference for State court adjudication of Indian rights and there is no obvious reason why a federal court whose jurisdiction is timely invoked to determine the existence and extent of Indian Reservation water rights should not proceed to decide that discrete federal question, so long as this does not materially delay the adjudication of the overall controversy or carry the risk of inconsistent decrees.

2. Admittedly, if a federal court determines tribal claims and the rights of other users are quantified in State proceedings, some "piecemealing" will result. But, it should be pointed out, that is the usual practice even

when the State courts perform the task of adjudicating Indian water rights. The reason is simply that reserved Indian rights, like other federal reserved water rights, are of an entirely different character than rights enjoyed by other claimants under the law of first appropriation, the governing principle in the West. See *Cappaert* v. *United States*, *supra*, 426 U.S. at 138-139. In the case of Indian water rights, the relevant inquiry is *not* what quantity of water was put to beneficial use on a given date. Rather, diversion rights appurtenant to an Indian Reservation are, by hypothesis, reserved as of the date the Reservation was established, regardless whether the water was then used, and quantification is premised on the future needs of the Indians, usually measured in terms of irrigable acreage. See *Arizona* v. *California*, 373 U.S. 546, 598-601 (1963). The fact is that the adjudication of Indian water rights requires a separate proceeding, whatever court system undertakes the task, and the bifurcation is not appreciably different if a federal court performs that role.[19] There is accordingly scant basis for the charge that the determination of Indian Reservation water rights by a federal court will delay or disrupt the general stream adjudication of all other claims in the State proceedings—normally a more protracted undertaking.[20]

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[19] The point is illustrated by the procedure followed by the Water Master appointed by the Fifth Judicial District Court of Wyoming in *In re: The General Adjudication of All Rights to Use Water in the Big Horn River and All Other Sources, State of Wyoming*, Civil No. 4993. In that case, the Master severed for a separate trial, prior to the general adjudication, the quantification of the rights reserved for the Wind River Indian Reservation. The decision of that matter will be "plugged in" when the comprehensive decree is ultimately entered. Obviously, that task could have been performed, with no greater disruption, by a federal court or a Master appointed by such a court (perhaps, even, the same Water Master acting for the State court). See Fed. R. Civ. P. 53.

[20] Indeed, that appears to be the view of the Montana Supreme Court which, in denying our motion to delay the State adjudication, observed that "[t]he pendency of federal litigation does not affect the State of Montana in proceeding to adjudicate non-Indian claims." 81-2188 Pet. App. 143-144.

Nor does the suggested procedure entail any duplication or potential for inconsistent judgments. The federal court will quantify the Indian rights only if it is asked to do so before the State court has embarked on the task. And, of course, once the United States district court has indicated its determination to perform that limited role, we assume the State tribunal will turn its attention to the typically more complex business of adjudicating all other claims on the stream. In the usual case, the federal court will have completed its function earlier and its quantification of Indian water rights will simply be incorporated in the comprehensive State court decree.

3. Eschewing objections premised on jurisdictional jealousy or forum shopping, petitioners nevertheless have conjured up a full menu of obstacles to this accommodation. One of these builds on the situation in which a Tribe (rather than the United States) invokes the federal forum to have it own claims quantified and the United States or another Tribe has competing claims on the same river and declines to intervene. In such a case, it is argued, the McCarran Amendment does not permit involuntary joinder of the United States (as trustee for another Indian Tribe or as holder of non-Indian water rights), so that the judgment would remain subject to challenge by the federal government. We take up that objection first.

The short answer is that the waiver of sovereign immunity accomplished by the McCarran Amendment does *not* depend upon all rights on a stream being adjudicated simultaneously in a single action where there are interrelated proceedings through which all claims will be determined "inclusively in the totality" and each user will be bound by the decrees ultimately entered. Whatever contrary indications might have been derived from *Dugan* v. *Rank*, 372 U.S. 609, 617-619 (1963), this was settled by the Court's ruling in *Eagle County*, *supra*, 401 U.S. at 525-526, and *Water Division No. 5*, *supra*, 401 U.S. at 529-530, which sustained the involuntary joinder of the United States in supplementary proceedings that, added

to what had gone before, would, result in interlocking decrees adjudicating all outstanding rights and binding all users.[21] There, to be sure, the separate proceedings contemplated were all in State court. But nothing in the McCarran Amendment distinguishes between "piecemealing" in a single court system and a like class-by-class adjudication procedure divided between State and federal courts.

Thus, in those of the present cases that were instituted by a Tribe and to which the United States is not yet a party, if the government determines not to intervene, it can and should be made an involuntary defendant—together with all claimants on the stream—so that it will be bound by the judgment.[22] So, also, the United States

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[21] In *Water Division No. 5, supra*, 401 U.S. at 529, the Court explained *Dugan* v. *Rank*, stating "the words 'general adjudication' were used in *Dugan* v. *Rank*, 372 U.S. 609, 618, to indicate that 43 U.S.C. 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants." The fact is that in *Dugan* all claimants were not joined in the proceeding. See *California* v. *Rank*, 293 F.2d 340, 348 (9th Cir. 1961). Nor was there any prospect that all rights would be adjudicated.

[22] Presumably, the United States should be joined even if there are no non-Indian federal claims on the stream, on the ground that it is the legal "owner" of tribal water rights and, unless a party to the adjudication, would not be bound by the judgment. See *United States* v. *Hellard*, 322 U.S. 363 (1944); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *Privett* v. *United States*, 256 U.S. 201 (1921). The point is largely academic, however, since, almost invariably, there will be other federal claims on the streams of the West where most Indian Reservations are located. At all events, the safer course for any Tribe initiating a proceeding to quantify its own rights is to join the United States, if not otherwise a party, leaving it to the government to determine whether it wishes actively to participate.

Concededly, what we say here is at odds with the stance of the United States in the *Navajo* case below. Fortunately, however, neither the district court nor the court of appeals decided the point and the case comes to this Court unembarassed by any prior ruling

will be a party in the State proceedings, and, at the end of the day, all users will be controlled by the comprehensive State court decree that incorporates the federal court quantification of tribal rights. The policies of the McCarran Amendment will then be fully satisfied.

Nor does our submission present any unusual problems when there are two or more Indian Tribes with competing claims on the same stream. Normally, when one of them initiates a federal proceeding to have its rights adjudicated, the other Tribes will seize the occasion to advance their own claims. If they do not, the other Tribes must be content to be represented by the United States—as they would be in the State court. In no case will any Tribe be free to stand aside and avoid quantification of its diversion claims.

In sum, no scenario we can envisage, however improbable in practice, leads to a jurisdictional impasse. Our submission permits no claimant to escape adjudication of his rights or to emerge from the combined federal-State proceedings without being fully bound. That is, after all, the true goal of the McCarran Amendment.

4. The final objection interposed by petitioners rests on the allegedly duplicate burden imposed on all stream users if they are required to appear in both federal and State court proceedings. We are not insensitive to that consideration, albeit it cannot automatically prevail over the important prerogative of Indian Tribes to have their federal rights determined in federal court. But, in truth, the problem has been much exaggerated.

We stress, once again, that the federal court proceeding we envisage is limited to the quantification of Indian rights. No other claimant is required—or permitted—to

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on the propriety of a Tribe joining the United States as an involuntary defendant in a proceeding seeking quantification of tribal water rights alone.

establish his own rights in that action.[23] Of course, other users may have an interest in holding down the tribal entitlement, since it will often enjoy a relatively early priority. But all those concerned on that score have the same interest and can make common cause. In practice, the burden of challenging the tribal claim will be delegated to one or a limited number of non-Indian users. The State itself, an affected municipality, an industrial consumer, an irrigation district or a water users' association, or a combination of such organizations, typically will take up the task, leaving smaller claimants free to watch from the sidelines.

At all events, the situation is no different when the State court bifurcates the proceeding, first quantifying federal and Indian reserved rights, as is common. See note 19, *supra*. There, as under our suggested procedure, every competing water user has, in principle, two separate cases to make—one against the Indian claims and another to establish his own rights. But actual experience teaches that the first task will be shouldered by the larger corporate or institutional claimants. Indeed, it is not uncommon for the rights of individual small users to be agreed by all. See, *e.g.*, the Supplemental Decree in *Arizona* v. *California*, 439 U.S. 419, 424-427, 429-436 (1979), in which all "Miscellaneous Present Prefected Rights" other than those of the principals were adjudicated by consent.

This is not to say that smaller claimants ought not be represented in the federal proceedings. Most likely, the State itself will represent their interest in challenging any

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[23] Here, as throughout this brief, we assume that a general stream adjudication has been initiated in the State courts. That is the situation in Arizona and Montana and, predictably, will be the case in any Western State as soon as the United States or a Tribe invokes federal jurisdiction to quantify water rights. But, of course, if no State proceedings are underway or promptly begun, the federal court will have no occasion to defer and should proceed to adjudicate at least all rights derived from federal law or held by the United States. See, *e.g.*, *Cappaert* v. *United States*, *supra*.

allegedly excessive tribal claims, as was the case in *Arizona* v. *California*, 373 U.S. 546 (1963).[24] See National Water Commission, *Water Policies for the Future: Final Report* 479 (1973). Indeed, in the cases now before the Court, the small private users seem content to leave that task to the petitioning States or other large public entities.

Alternatively, as in *United States* v. *Truckee-Carson Irrigation District*, 71 F.R.D. 10 (D. Nev. 1975),[25] a defendant class can be certified. See Fed. R. Civ. P. 23. No doubt, notice should be given to each potential

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[24] It is no ground of distinction that *Arizona* v. *California* was, in part, an *interstate* apportionment of diversion rights, invoking the original jurisdiction of this Court. The fact is that, from the time the United States intervened with leave of the Court (344 U.S. 919 (1953)), we sought a quantification of Indian Reservation rights within each of the three Lower Basin States (see 373 U.S. at 595), and judgment was entered accordingly (376 U.S. 340 (1964); 439 U.S. 419 (1979)), although no competing claimant, other than the State itself, was a party to the proceeding in Arizona or Nevada, and, in the case of California, the only additional participants were municipalities and a limited number of other State agencies. Obviously, the underlying rationale was that, vis-a-vis the Indian claims, the State was appropriately acting as parens patriae for all non-Indian users within the State. Cf. *New Jersey* v. *New York*, 345 U.S. 369, 372-373 (1953). If that is permissible in this Court, we do not appreciate why it is not equally so in a district court proceeding. Cf. *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979). See, also, the stance taken in this Court by the State of Nevada in its brief (at 22 n.25) in *Nevada* v. *United States*, No. 81-2245.

What *Arizona* v. *California* teaches, it seems to us, is that the adjudication of Indian Reservation water rights is a discrete task, quite distinct from the more complex determination of other rights *inter sese* under the law of first appropriation, which, like the apportionment of an interstate stream between States, properly can be accomplished separately, and preferably first, as against all competing claimants whose common interest may be vindicated by the State or other representative agencies.

[25] This case is now before the Court sub nom. *Nevada* v. *United States*, No. 81-2245, *Truckee-Carson Irrigation District* v. *United States*, No. 81-2276, and *Pyramid Lake Paiute Indian Tribe* v. *Truckee-Carson Irrigation District*, No. 82-38, cert. granted, Oct. 12, 1982.

claimant. But, even if every user must be individually notified, that poses no insurmountable problem. Usually, such a list is already available to the State Engineer and, in any case, must be compiled for the complementary State proceedings. There is no reason that list of users cannot be furnished to the plaintiff in the federal court. See *United States* v. *Truckee-Carson Irrigation District, supra*, 71 F.R.D. at 18. Indeed, in some cases at least, it may be practical to serve all potentially affected persons in both actions by a single mailing. At all events, it borders on the frivolous to argue that if two sets of notices must be mailed, a federal court ought to abdicate its responsibility on that ground.

At the end of the day, it is difficult to appreciate the objections advanced against federal court adjudication of Indian rights founded on federal law, while the State court determines all other rights—a result which seems to us to further cooperative federalism. We may assume that, once their respective responsibilities are clearly defined, the State and federal courts will coordinate their proceedings in such a way as to avoid any potential conflicts as to timing or other procedural matters. And it is perhaps not too fanciful to suppose that eliminating the occasion for jurisdictional maneuvering will encourage the litigants themselves to agree resolution of at least some competing claims at the conference table.

D. Application of these principles to the present cases calls for affirmance with some modifications

Thus far, we have addressed the question presented without focusing on the particular facts or the special procedural history of the cases now before the Court. That is because experience under the *Akin* decision has led us to the conclusion that a clearer and more generalized rule is required if the wasteful and acrimonious procedural skirmishing illustrated by the present cases is to be avoided for the future. Our submission is designed to suggest a firmer guideline. It remains, however, to apply

the principles we have outlined to the actual cases presented to the Court.

1. First, we share petitioners' view in No. 81-2147 that the court of appeals inappropriately remanded the cases "for a determination of whether Arizona has obtained jurisdiction over the Indians pursuant to Public Law 280." 81-2147 Pet. App. A-9. See, also, *id.* at A-11, B-4. And the same observation applies to the Montana cases involved in No. 81-2188 if that judgment envisages a like remand.[26] Like petitioners, we read Public Law 280 as expressly exempting Indian water rights from the optional assumption of jurisdiction pursuant to that statute. 25 U.S.C. 1322(b); 28 U.S.C. 1360(b). See *Akin*, *supra*, 424 U.S. at 812-813 n.20. If the Indian disclaimer provision of the Arizona and Montana Enabling Acts is a bar to the adjudication of water rights by the State courts and the McCarran Amendment did not remove it, we do not appreciate how State legislation alone could override that federal law impediment. On the other hand, if the Enabling Act disclaimers are inapplicable or were set aside by the Amendment (as we believe), there is no basis for requiring Arizona or Montana to enact special legislation to overcome the State constitutional disclaimers. That condition, we believe, applies only to State assumption of jurisdiction under Public Law 280, which is not invoked here. See 25 U.S.C. 1324.

In our view, the court of appeals should have simply reversed the several district court judgments dismissing or staying proceedings, directing those courts to proceed to adjudicate the Indian water rights claims tendered on the

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[26] On its face, the opinion in the *Montana* cases unconditionally reverses the order of dismissal and directs the district court to proceed to adjudication. 81-2188 Pet. App. 45, 46. On the other hand, the opinion in the *San Carlos Apache* case, in referring to the *Montana* cases, recites that they, also, have been remanded for a determination whether the Montana constitutional disclaimer has been effectively overriden as a matter of State law. 81-2147 Pet. App. A-9. We assume this latter statement is erroneous. At all events, this Court's decision presumably will make it unnecessary to resolve any ambiguity.

sole condition that the pleadings be appropriately amended within a reasonable time.

2. In the Montana cases, the subject of the petition in No. 81-2188, there can be no question that federal jurisdiction was timely invoked. Three of the actions were initiated in federal court in 1975, four years before the comprehensive Montana water plan was enacted, and, in the words of the court of appeals (81-2188 Pet. App. 41), "the district courts stayed proceedings, apparently awaiting the state legislation." Even the remaining actions were filed before the new Montana statute took effect and were held in abeyance for more than seven months (*id.* at 27-28). Moreover, although we do not share the view that the United States suffers any disabling "conflict of interest" in representing the Tribal water claims (see *id.* at 43-44, 42), it is relevant that the Indian Tribes are parties (or seeking to intervene) in most of the cases, anxious to assert their own claims through attorneys of their choosing, and have invoked the federal court's jurisdiction under 28 U.S.C. 1362 to that end (81-2188 Pet. App. 44-45).

In these circumstances, we think it clear that the court of appeals was right in holding that the federal court should have retained jurisdiction. To be sure, in our view, the district court ought confine itself to quantifying the Indian water rights, without otherwise interfering with the State stream adjudication proceedings. But we do not read the judgment of the court of appeals as barring that accommodation. For our part, we undertake to amend our complaints so as to eliminate any prayer that non-Indian water claims (federal, State or private) be adjudicated in the federal forum, and we believe the Northern Cheyenne Tribe, the original plaintiff in one of the cases, as well as the intervening Tribes, should be required to do likewise if they are not to suffer dismissal.

3. The Arizona cases involved in No. 81-2147 present a somewhat more complex procedural history. Although four separate proceedings before the State Land Depart-

ment to determine rights on the Salt, Verde, Gila and Little Colorado Rivers were filed between 1974 and 1978, no service of process was attempted in any of these cases until early 1979, and service has not yet occurred in two instances. Each of the six Indian Tribes involved invoked the jurisdiction of the federal court in the Spring of 1979, seeking various relief. Only thereafter did Arizona enact legislation to transfer the task of determining water rights from the Land Department to the State courts, and not until late 1981 did the Arizona Supreme Court consolidate the proceedings relating to the Gila River and its major tributaries, the Salt and Verde Rivers. See 81-2147 Pet. 7-8. To this date, no evidentiary proceedings of any kind have occurred in the State courts, and all further action has been suspended pending this Court's ruling. 81-2147 Pet. App. G-1, H-1.

In this posture of the cases, we believe the district court should have assumed jurisdiction to quantify the Indian Reservation water claims. In at least three instances, the Tribe expressly sought such a limited adjudication by the federal court.[27] In the remaining cases, it appears that the Tribe was not asking for a quantification of its rights and, in our view, such a prayer must be made if adjudication by the State court is to be avoided. But, in the present situation, that request would not be untimely.[28] Finally, except in the *Navajo* suit, the United

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[27] These are the *Fort McDowell Mohave-Apache*, the *San Carlos Apache* and the *Navajo* cases. See nn. 4-6, *supra*. But see n.28, *infra*.

[28] Indeed, federal court actions, initiated by the United States or the Tribe, or both, have since been filed, seeking, *inter alia*, adjudication of the water rights of the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community. See *United States* v. *City of Phoenix, et al.*, No. CIV. 82-2173 PHX WPC (filed Dec. 29, 1982); *Salt River Pima-Maricopa Indian Community* v. *Aguilar, et al.*, No. CIV 82-2162 PHX VAC (filed Dec. 23, 1982), Motion to Intervene by Gila River Indian Community in *United States* v. *Gila Valley Irrigation District, et al.*, Globe Equity No. 59 (filed Dec. 27,

States should be made a party, whether by intervention or joinder as a defendant. On these conditions, we believe the judgments of reversal in the Arizona cases should be affirmed.

CONCLUSION

The judgments of the court of appeals in both Nos. 81-2147 and 81-2188 should be affirmed with the modifications indicated.

Respectfully submitted.

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1982); *United States* v. *Roosevelt Conservation District, et al.*, No. CIV. 82-2174 PHX CLH (filed Dec. 29, 1982); *Gila River Indian Community* v. *Asarco, et al.*, No. CIV 78-145 TVC MAR (filed June 30, 1978).

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